TOWARD A POLITICAL THEORY FOR PRIVATE INTERNATIONAL LAW

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Private international law presents a dilemma for legal and political philosophy. Legal and political philosophers have ignored private international law, with only a few scattered attempts to evaluate its claims. Private international law offers a powerful set of counterexamples that put into serious doubt attempts to link law's authority only or primarily to relationships between states and citizens. No society, state, or other practice-mediated relationship can serve as grounds for the authority of private international law to persons to whom it applies but who are outside of such relationships. Private international law affects the normative situations of persons entirely outside these relationships. This article examines these issues from the standpoint of contractualist moral and political philosophy. How can private international law be justified from a moral point of view? The aim of this article is to show that the moral justification of private international law, in particular the law on jurisdiction and recognition and enforcement of foreign judgments, requires an evaluation of the coercive qualities of private international law. Suitably constructed moral principles, which permit reasonable restrictions on liberty, are developed.

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INTRODUCTION

Private international law has received almost no attention in political philosophy and normative jurisprudence. Much of the present focus in political philosophy is on the relation of state to citizen, but that focus effectively limits the discussion to domestic law within the scheme of social cooperation in a political community whose borders are those of the modern state. Public international law, on the other hand, has received considerable recent philosophical attention and has a rich historical connection to moral philosophy, at least before the rise of positivist approaches to public international law. The lack of attention to private international law is a classic illustration of how gaps can arise in the philosophical literature when philosophers do not adequately take institutions into account. Private international law is neither the canonical form of domestic law, nor does it offer the feature of a lack of a supreme sovereign authority as is relevant for public international law. The result is that the moral status of private international law remains unsettled. This article proposes some solutions.

Much contemporary political philosophy works from limitations resulting from the influence of one of the greatest political philosophers, Thomas Hobbes. In Hobbesian-influenced political philosophy, the focus is on the relationship of state to citizen and on the role of the sovereign in ordering relations within the state. For Hobbes, positive law brings about

order inside the modern state. But as between states, a state of nature characterized by an overriding duty of self-preservation prevails.[1] In a Hobbesian world, foreigners are not participants in the social contract and are, therefore, subject to whatever actions states deem appropriate in the interest of self-preservation.

Looking to another important line of contemporary analytical philosophy, though a satisfactory theory on the general obligation to obey the law has yet to be developed, Leslie Green's five conditions that an argument must meet to demonstrate a general obligation to obey the law are well accepted and offer a striking illustration of how private international law may not receive sufficient attention.[2] Green's fourth condition is that any argument for an obligation to obey the law must show that the obligation is a "particular" reason for action, meaning that the obligation applies only to legal directives of the citizen's or subject's own state, and not to the directives of other states.[3] Private international law, and more generally any domestic law that purports to subject foreigners to legal obligation, are left unaddressed.

Sporadic works over several decades have attempted to address the authority of private international law. A few have focused on Lockean tacit consent, but the problems with this approach are well-understood.[4] Lea

1. A common argument in the 16th through 18th centuries, as Locke put it: "I see not how the magistrates of any community can punish an alien of another country; since in reference to him they can have no more power than what every man naturally may have over another." JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 9 (J.W. Gough ed., 1947). This reasoning has to be understood along with what Locke called a "very strange doctrine," stated previously by Grotius and others, that "every man hath a right to punish the offender [of natural law in a state of nature], and be executioner of the law of nature." *Id.* §§ 8, 9.

2. *See generally* LESLIE GREEN, THE AUTHORITY OF THE STATE 224–29 (1990). Curiously, Green adds a footnote to the discussion in a later writing, stating that a person might also have an obligation to obey the law of another state, but he does not explain what he means. *See* Leslie Green, *Law and Obligations*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 514, 525 n.34 (Jules Coleman & Scott Shapiro eds., 2002).

3. I use Stephen Perry's formulation. *See* Stephen Perry, *Political Authority and Political Obligation*, *in* OXFORD STUDIES IN PHILOSOPHY OF LAW: VOLUME 2, at 1, 7 (Leslie Green & Brian Leiter eds., 2013) (adopting Green's five conditions that an argument must meet in order to show that "there is, within a given legal system, a general obligation to obey the law"). Green and others argue that no one has offered a theory meeting the five conditions. *See* Leslie Green, *Legal Obligation and Authority*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2012), http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=legal-obligation (surveying "plausible objections to each of the dominant justifications for the duty to obey the law").

4. *See generally* Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849–906 (1989); Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE WESTERN RES. L. REV. 97–159 (1992). Locke argued that an alien gives tacit consent to the state in which he is an alien by possessing land in the state or by visiting or travelling through the state. Locke, *supra* note 1, §§ 119, 122. As A. John Simmons points

Brilmayer makes an important contribution in her discussion of the relevance of coercion to the legitimacy of private international law, but her proposed "political" justification for private international law is problematic.[5] These arguments are question-begging, as no political relationship exists between a foreigner and the state. A foreigner is not a member of the political community that has produced the private international law rule in question and is, accordingly, owed nothing on the basis of any political relationship with the state. Actions outside the state are not "political," at least not as that concept is usually employed in mainstream political philosophy to refer to matters between state (a political community) and citizen (a member of that political community). Moreover, Brilmayer's use of concepts like "fairness" could generate confusion because such terms usually refer in political philosophy to egalitarian justice.

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out, to begin to get clearer on what we mean by consent, we have to look to the purpose for which consent is given. A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 167 (2001). Consent to what? Simmons contends that Locke meant that an alien consents to be bound by the law of a foreign jurisdiction in exchange for the protection of the law of that foreign jurisdiction. *Id.* at 168–69. We can rule out this tacit consent as a moral justification for private international law. Someone with no authority to issue commands at all cannot require someone else to submit to these commands. Lea Brilmayer offers the example of a board of directors meeting in which, rather than the chairman proposing a date for a meeting, a window washer swings in and proposes a date. Failure of board members to raise an objection would clearly not constitute consent to the date. LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 60–61 (1989). Only a duly constituted authority has the right to make the proposal. *Id.* A person has to stand in the right authority relationship for tacit agreement to be able to operate. *Id.*

Another way to understand the binding nature of private international law is as pre-political natural rights of some kind, but this approach has its problems. Thomas Nagel has made the Hobbesian argument that in the non-relational contexts of citizens and foreigners, it is sufficient justification to claim that a government's policies do not violate pre-political human rights: "States are entitled to be left to their own devices, but only on the condition that they not harm others." Thomas Nagel, *The Problem of Global Justice*, 33 PHILOSOPHY & PUB. AFF. 130 (2005). These pre-political rights are of course "universal, and not contingent on specific institutional relations between people." *Id.* It is unnecessary to enter the contested terrain of whether the rights of foreigners and the duties of states are pre-political. I will instead rely on a constructivist approach.

Another approach might be that of Jeremy Waldron and his search for an *ius gentium*, a theory of the law of nations based on a consensus at something at the level of principles in the way that Dworkin uses the concept of principles. JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 27–28 (2012). My approach differs from Waldron's in substantial respects.

5. *See generally* BRILMAYER, *supra* note 4; Lea Brilmayer, *Liberalism, Community, and State Borders* 41 DUKE L. J. 1 (1991); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L. J. 1277 (1989) [hereinafter Brilmayer, *Rights, Fairness, and Choice of Law*]; Lea Brilmayer, *Shaping and Sharing in Democratic Theory*, 15 FLA. ST. U. L. REV. 389 (1987); Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, U. FLA. L. REV. 293 (1987). Brilmayer's work, moreover, is more comprehensive in scope than mine, as she also deals with choice of law and more generally about the obligations of states beyond their borders.

Nonetheless, Brilmayer is correct in arguing that coercion is central to understanding the justification for private international law. Part I of this Article offers a strategy for justifying the coercive features of private international law. Coercion plays a central role in a process of justification of private international law on moral grounds because there is no political community or scheme of social cooperation to ground relevant principles of institutional morality. As explained below, such is the case regardless of which country's laws we are discussing. Part II identifies a moral principle based on the notion of liberty as a means by which to morally evaluate the law on jurisdiction. Part III develops the account for the law on recognition and enforcement of foreign judgments.

I. JUSTIFYING COERCION IN PRIVATE INTERNATIONAL LAW

To ensure clarity throughout, I want to begin with some basic building blocks, starting with the notion of what it means to justify a legal rule or policy. Then I will address the sorts of justificatory strategies that might work for private international law.

What does it mean when we ask whether private international law is morally justifiable? Why is this question worth asking at all about private international law? According to A. John Simmons, "[j]ustifying an act, a strategy, a practice, an arrangement, or an institution typically involves showing it to be prudentially rational, morally acceptable, or both (depending on the kind of justification at issue)."[6] My aim is to demonstrate the moral acceptability of legal doctrine, or, as it is more widely understood in the philosophical literature, moral legitimacy. Prudential rationality might be dealt with in an economic analysis of the law. Moreover, moral justification is practical and not epistemic justification.[7] We want to know why law has practical authority and not whether some proposition of the law is true or false.[8] Moral justification tells us why a lawgiver (or law enforcer) has a right to rule persons who have autonomy by virtue of their status as persons.

Justification has an affirmative element: when we justify, we make some assertive claim about why law has the authority it has from a moral standpoint. Moral justification also involves rebutting potential objections.

6. SIMMONS, *supra* note 4, at 123. I do not deal with Simmons's distinction between justification and legitimacy, which is not well accepted.

7. *See id.* at 124 n.3 (explaining that the moral theories of justification being discussed do not apply to epistemic justification).

8. My focus here is on what philosophers call *de jure* authority, which is about the authority law actually has, understood as a moral question about the right to rule. I do not deal with *de facto* authority, which is about the power that law claims to have to change the normative situations of persons.

Simmons argues that justification is a "defensive" concept because we see it "against a background presumption of possible objection."[9] For example, we may justify a legal rule prohibiting some behavior by comparing it to a legal rule permitting that behavior. Such a comparison might involve justifying coercion against a background presumption of liberty.[10] Take, for instance, developing a moral justification for criminal punishment involving a loss of liberty. In the private international law context, we want to justify a given court's power to issue a ruling that coerces a foreigner or affects a foreigner's interests.

In order to better understand the role of justification, it might be helpful to contrast it with explanation. Explaining what the law is or its effects on behavior is a way of thinking about the law that differs considerably from justifying it morally. Explanations are often naturalistic. In a naturalistic account, it would be argued that people do not respond to moral reasons for action; instead, the brain's electromagnetic responses to particular external events cause persons to act in particular ways. Neuroscience about morality attempts to explain that whatever reasons I either have, or ought to have, to do act "*p*" do not control my behavior. Indeed, they may have nothing to do with it. I will likely be totally unaware of the brain functions that are the real cause of my action; therefore, these functions can neither justify my action nor offer reasons of a normative kind in support of my actions. Naturalistic approaches explain why people do *p* in a behavioral sense. An explanation in a legal context seeks to answer the question why people do *p* in response to a legal command. A number of competing theories exist for explaining behavior. Some social, biological, psychological, or other explanation might assist us in understanding why people do *p*. Explanations of why people do *p* differ from justifying *p* as the right course of action. To justify *p* as the right course of action from a moral point of view is to support *p* with moral reasons that appeal to persons, understood in moral philosophy, to have moral capacities. In a legal context, when we look to morally justify a legal command, we want to know whether the command offers moral reasons for action that appeal to such persons.

Moving to the political, and taking justification to apply to institutions of the state, naturalistic approaches are relevant but justification retains special importance. In political contexts, we seek to justify a collective choice made as a matter of policy and reflected in sources including constitutions, statutes, and court judgments. A naturalistic approach might

9. SIMMONS, *supra* note 4, at 124.

10. *Id.*

explore how people respond to these policies, or might inform lawmakers on how to design policies that influence behavior in particular ways to conform to what we might consider a "just" or "right" result. Designing policies in this manner is not justification; rather, it is epistemic and causal in its focus. The policies' justification is a separate normative question.

When we attempt to morally justify private international law, we ask how private international law doctrines might make a claim or demand that we do as the law dictates based on moral reasons for action. Apart from the raw force inherent in the compulsory processes of jurisdiction, why should a foreigner pay any attention to the law of another state? Would a citizen have good reasons to reject a finding by its own court favoring a foreigner? These are the sorts of questions moral justification seeks to answer.

Having explained the aims of justification, we can now consider how we can go about justifying private international law as morally legitimate to both citizens and foreigners. The question sometimes is framed around the role and significance of official state coercion in a legal system.[11] Theories of legitimate state authority tend to be structured in two alternative ways. The first is to start with an argument for the state's authority over its citizens or subjects and then use the argument to justify the coercive order the state imposes. In these arguments, coercion is secondary and it often lacks normative significance. The second approach is to start and end with coercion. In this approach, the question is whether the state has the right to coerce. If it does, then it has the power to change the normative situations of the persons it affects. Coercion in this second approach has direct moral relevance.[12]

Coercion is not entirely irrelevant in the first approach. It can be relevant, for instance, to practice-mediated relations such as law, as in Michael Blake's theory of equality. Blake argues that citizens in a state who share a coercive legal system are sharing private law that results in a moral demand for equality between citizens. This is because private law creates and maintains a system of entitlements and property rights.[13] While we are not concerned here with egalitarian justice, what Blake's theory tells

11. For a discussion of two ways in which the concept of coercion enters into moral justification, see generally Arthur Ripstein, *Authority and Coercion*, 32 PHILOSOPHY & PUB. AFF. 2 (2004).

Ronald Dworkin provides an argument for justifying law's coercion but it connects to associative obligations in a political community and its relevance to private international law is unclear. *See* RONALD DWORKIN, LAW'S EMPIRE 93–94 (1986).

12. *See* MATHIAS RISSE, ON GLOBAL JUSTICE 2–8 (2012) (explaining different theories of the role that human relations can play in determining "the grounds of justice"); *see generally* Nagel, *supra* note 4 (discussing practical questions of justice in world governance systems).

13. *See generally* MICHAEL BLAKE, JUSTICE AND FOREIGN POLICY (2013); Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHILOSOPHY & PUB. AFF. 257 (2001).

us is that coercion can be associated with practice-mediated relations.[14] For Blake, these practice-mediated relations are in a shared system of private as well as public law, coercively imposed in a municipal legal system.

Blake's account is only indirectly relevant to private international law. But it makes the important point that coercion by a state actually comes in two forms: relational and non-relational.[15] Coercion is relational if it connects to a set of institutions, what Rawls called the basic structure of society, within the state. Relational coercion is the sort Blake writes about. Mathias Risse argues that the demands of egalitarian justice among citizens of a state require both coercion and large-scale social cooperation. The demands of egalitarian justice require "dense relationships of coerciveness and cooperativeness" that shared membership in a state provides.[16] Risse argues that the coercion of the state has a particular legal and political immediacy —an immediacy of interaction between the individual and the state. The legal aspect of immediacy is what he calls the "directness and pervasiveness of law enforcement. State enforcement agencies have direct, unmediated access to bodies and assets."[17] The political aspect of immediacy "consists in the significance of the environment that the state provides for the realization of basic moral rights . . . ."[18]

Coercion can also be non-relational, as in the private international law context, or, more commonly, where domestic law is applied extra-territorially. Non-relational coercion is arguably a purer form of coercion. When we take private international law into account, the two different kinds of arguments about the moral legitimacy of institutions dissolve; we have no choice but to focus on coercion as the first order of business. Risse's political immediacy does not exist between a state and foreigners. In the private international law context, only the possibility of isolated or occasional legal immediacy exists in the relationship between the state and foreigners. Therefore, the justification of coercion takes on special relevance in the application of law by the state to foreigners. There is no political relationship between state and foreigner to mediate what legal

14. In rebuttal, Andrea Sangiovanni argues that Blake fails to focus on what is morally relevant – the practice mediated relations themselves. Sangiovanni argues that the demands of egalitarian justice come from a requirement of reciprocity in the mutual provision of a set of collective goods necessary for people to develop and act on a plan of life. *See generally* Andrea Sangiovanni, *The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice*, 40 PHIL. & PUB. AFF. 79 (2012); Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHILOSOPHY & PUB. AFF. 3 (2007).

15. I am borrowing loosely here from Mathias Risse. *See generally* RISSE, *supra* note 12, chs. 1–2 (exploring the differences in relational and non-relational theories of the grounds of justice).

16. *Id.* at 33.

17. *Id.* at 25–26. Risse is in broad agreement with Nagel here.

18. *Id.* at 26.

immediacy might impose. Political obligations bind persons to the states in which they are citizens. There is something special about political obligation of citizen to state, wholly absent in the interaction of the state with foreigners.

In a private international law context, at least one of the parties to the litigation may be a foreigner, the dispute at hand may have occurred outside of the state in which the court sits, property relevant to the suit may be outside the territory of the state in which the court sits, and so on. No social contract or citizenship exists upon which to rest a foreigner's duty to accept the court's orders.[19] In fact, some other state often has substantial connections to the person(s) affected or to the dispute or property at issue.[20] These complexities invite several inquiries. The first is why a court has jurisdiction over foreigners in the first place. In the case of jurisdiction, we ask whether a court's exercise of its power over a person or a person's property provides that person with reasons to comply of the moral kind relevant to this article. We must also ask whether a court is justified in recognizing and enforcing within its state the judgment of another court from another state. Coercion is particularly relevant where the enforcement of foreign judgments is concerned because the court's enforcement may favor of a foreigner's interests over those of a citizen of the state in which the court sits.

One way to justify the non-relational forms of coercion in private international law is to employ familiar constructivist and contractualist strategies.[21] For example, in his recent book, Aaron James offers a methodology in which one identifies moral principles "for, and in the light of, an independently identified social practice," on the basis of: (1) a "morally informed 'constructive interpretation'" of the aims of the relevant social practice, (2) an "explication of the morally relevant interests at stake," and (3) reasoning about what law is reasonably acceptable (or at

19. *See id.* at 13 (explaining that the "traditional form of [the social contract theory] envisages a state of nature in which individuals live together before there is political authority" and is "supposed to determine the scope and limits of justified state power").

20. *See id.* at 16 (noting that the traditional model of a domestic social contract is rendered "problematic" because of today's "politically and economically interconnected world").

21. For those unfamiliar with the contractualist moral philosophy, see generally T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998). Rawls's writings are the most significant on constructivism. Rawls was also a contractualist. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1999); JOHN RAWLS, COLLECTED PAPERS (Samuel Freeman ed. 1999) (including chapters on "Justice as Fairness," "Political Liberalism," and "Kantian Constructivism"). A great deal has been written on these subjects and no footnote can adequately explain the intricacies of the theories.

least not reasonably rejectable) to each person affected with respect to the relevant interests at stake.[22]

James situates his constructive method between two opposing concepts: "pure moralism," in which moral principles are developed abstractly as pure moral argument, and "pure interpretivism," in which the development of moral principles is solely internal to the social practice.[23] James explains that his constructive method is not purely interpretive because it "assumes that moral principles cannot be justified by mere social interpretation" and that "morality is not a function of what people happen to implicitly assume or explicitly accept."[24] Rather, moral principles are justified by "substantive moral reasoning."[25] James also explains that his constructive method is not pure moralism because moral principles "have to be justified specifically for, and from, an *independent conception of the practice* in which the principles are to have a regulative, governing role."[26] To construct such an independent moral principle, James advocates three steps: (1) identification of the social practice, which would be traditional legal analysis for our purposes; (2) moralized characterization, to include evaluating the moral aims of the law; and (3) moral assessment, which requires engaging in substantive moral reasoning about whether the law is reasonably acceptable to each person affected.[27]

Another way to understand the constructive procedure used here is as non-ideal theory. Rather than constructing moral principles in idealized conditions, such as behind a Rawlsian veil of ignorance in the original position, and then argue for a set of institutions as if "starting from scratch," we look at the institutions we actually have and ask whether they are morally justified, and, if they are not, how we might want to change them.[28]

A number of concepts come into play in the constructivist procedure outlined here. In justifying the non-relational coercion that characterizes municipal law's power over foreigners, for example, the relevant considerations include reasonable rejection, the separateness of persons,

22. *See* AARON JAMES, FAIRNESS IN PRACTICE: A SOCIAL CONTRACT FOR A GLOBAL ECONOMY 26–27 (2012).

23. *Id.* at 27.

24. *Id.*

25. *Id.*

26. *Id.* (emphasis added).

27. *Id.* at 27–28.

28. The literature on ideal versus nonideal theory in political philosophy is relevant here. *See* Zofia Stemplowska & Adam Swift, *Ideal and Nonideal Theory* in OXFORD HANDBOOK OF POLITICAL PHILOSOPHY (David Estlund ed. 2012).

and respect for autonomy. Another consideration is that an action or a rule (such as a legal rule) should be morally justifiable to everyone affected by it, regardless of citizenship status or membership in a society. A notion basic to moral justification is impartiality. Impartiality does not necessarily mean equality, and respect for each person can be upheld while still maintaining differentiated treatment of citizens and foreigners in particular cases. Standards for citizens and foreigners can differ if partiality is justified. A moral justification strategy of the sort outlined here would prohibit a state from coercing a foreigner in ways the foreigner could not reasonably accept or could reasonably reject. Finally, it is important to acknowledge that all official authority makes a demand on a person's will, and, therefore, we have reason to be skeptical about its power over us, particularly in the case of private international law because no pre-supposed authority-producing relationship exists.

Neither the state in which the court sits nor the legal tradition in which it operates bears on the philosophical inquiry undertaken here. The law may be of any legal tradition, whether it be common law, civil law, mixed, or another. Coercion does not change when it crosses a border. This is political philosophy, and it is intended to be general and conceptual. While coercion and the relationship of litigant to court might be more explicit in American law, European law also has coercive features: it mandates compulsory jurisdiction and conceives jurisdiction as a matter of right for the plaintiff.[29]

Finally, we must use the concepts of "citizen" and "foreigner" broadly here, beyond their standard philosophical usage. Much of transnational litigation involves multinational enterprises. While the law generally deals with the question of corporate "citizenship" as one of corporate seat or headquarters[30] and residence as one of carrying on business in the state, political philosophy has not dealt with these issues very well. The reason why is likely practical. To keep accounts tractable and parsimonious, assumptions are made, though often these assumptions are often unarticulated. These assumptions have the potential to mask power relationships. For now, I will have to maintain these assumptions.

29. The philosophical work undertaken here is to be distinguished from a comparative legal analysis, which may reach different conclusions. *See generally* Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003 (2006).

30. *See* Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3 (Feb. 5).

II. JURISDICTIONAL PRINCIPLES AS JUSTIFICATIONS OF COERCION

Now that we have set forth the basics of a strategy for morally justifying principles of private international law, we can move on to discuss the law on jurisdiction. The question here is when, if ever, a court can legitimately assume jurisdiction over a foreigner in favor of a citizen. Jurisdiction is, at its core, the power of a court to subject a person to its processes against that person's will.[31] The exercise of jurisdiction in a civil matter has the potential to alter a person's normative situation in significant ways, including the imposition of civil liability and the eventual taking of property by a court. These are actions of consequence by an instrumentality of the state.

To determine the moral relevance of these actions, I first develop a set of case studies from the universe of candidate legal principles on jurisdiction. I rely primarily on European and American law for these possible principles. Although the discussion of the law that follows may seem basic for private international lawyers, the development of these principles is nonetheless important for the first stage of our constructivist procedure, namely, identifying the relevant social practices. I then develop a moral principle of liberty to determine when jurisdiction is morally justified.

A. Possible Principles of Jurisdiction

Consider the following eight hypothetical cases and the legal principles they support. After we identify the candidate legal principles in these case studies, we will use our constructive procedure to evaluate their moral implications.

1. The Plaintiff's Citizenship, Domicile, or Place of Business

A is a French citizen. While on holiday in Hawaii, A is injured in an auto accident involving B, an American citizen and resident of Hawaii. A sues B in a French court. B has never left her Hawaiian island and has never even had a passport. B has dutifully complied with Hawaiian law requiring auto insurance coverage, but as is standard in American auto insurance policies, suits in courts outside of the United States are not covered. As the accident occurred in Hawaii, the witnesses are all in Hawaii. B loses her challenge to the jurisdiction of the French court. The French court grounds jurisdiction under Article 14 of the French Civil Code, which provides: "An alien, even if not residing in France, may be

31. Jurisdiction is "essentially the apportionment of power." BRILMAYER, *supra* note 4, at 15.

cited before French courts for the performance of obligations contracted by him in France with a French person; he may be called before the courts of France for obligations contracted by him in a foreign country towards French persons."[32]

This is, admittedly, a stylized and simplistic take on French Civil Code Article 14 and I do not want to exaggerate the significance of Article 14 to French jurisdictional law. Article 14 is supplemental, used very rarely, and is only one aspect of French jurisdictional law.[33] The French *Cour de cassation* has held that Article 14 raises no serious issues relating to equality or a right to a fair trial under the French Constitution.[34] The Court found that Article 14 grants only subsidiary jurisdiction to French courts that it is "optional" to the parties, and can be overridden by international treaty, presumably referencing the Brussels I Regulation, which in any event does not apply here.

2. The Defendant's Citizenship, Domicile, or Place of Business

The Brussels I Regulation is premised on the notion that, as a general matter, the defendant's domicile is the best allocating principle for jurisdiction among European Union (EU) member states. It provides that jurisdiction is based generally on the domicile of a defendant who is a natural person; the statutory seat, central administration, or principal place of business of a defendant company; or on special rules, such as the place where a contract is performed or where a tortious event occurred.[35]

A prominent example of what is now the Brussels I Regulation in action is the English case *Owusu v. Jackson,* in which the plaintiff and one of the defendants were domiciled in England, while additional defendants were Jamaican companies doing business only in Jamaica.[36] Jurisdiction over the Jamaican firms was established under English law and not what is now the Brussels I Regulation.[37] The harm occurred on a private beach in Jamaica, but an English judgment was likely to be unenforceable in Jamaica, and the Jamaican individual defendant would have had to seek indemnity in Jamaica if he were found liable in an English court.[38] The

32. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 14 (Fr.), *translated by* Georges Rouhette.

33. *See* Michaels, *supra* note 29, at 1040–45.

34. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 29, 2012, 11-40101 (Fr.).

35. Council Regulation 44/2001 of 22 Dec. 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 2–20, 2000 O.J. (L 12) 1 (EC).

36. Case C-281/02, Owusu v. Jackson, 2004 E.C.R. I-1383.

37. *Id.*

38. *Id.* ¶ 48.

defendants, including the defendant domiciled in England, requested a stay from the English court on grounds of *forum non conveniens*.[39] The case was eventually referred to the Court of Justice of the European Union (CJEU), which upheld jurisdiction based on Article 2 of what is now the Brussels I Regulation, which provides that jurisdiction shall generally be based on the domicile of the defendant.[40] The Court also rejected the application of the common law doctrine of *forum non conveniens* to cases falling within the Brussels I Regulation.[41] I will return to *forum non conveniens* in section 8 below.

3. The Place of the Harm or Event Relevant to the Litigation

The Brussels I Regulation specifies special principles for cases involving contract, tort, and a variety of other causes.[42] These special principles reflect a European approach in favor of clear, bright-line rules for the allocation of jurisdiction to courts.

4. The Defendant's Contacts With the Forum

This principle reflects an American approach to personal jurisdiction. In *International Shoe Co. v. Washington,*[43] the U.S. Supreme Court interpreted the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution to require that a person have "minimum contacts" with the state in which a court sits for that court to have so-called personal jurisdiction over the person.[44] For a court to have jurisdiction over a foreigner (broadly defined as an out-of-state defendant, whether domestic or foreign), the defendant must have "purposely availed" herself of activities in the forum state and hence of the benefits and protections of the forum.[45] Claiming jurisdiction without minimum contacts violates the nonresident defendant's Due Process right, as it "offends

39. *Id.*

40. *See* Council Regulation 44/2001, *supra* note 35, arts. 2, 8.

41. *See, e.g.*, *Owusu*, C-281/02, ¶ 264 ([T]he *forum non conveniens* doctrine fits easily within the common-law system . . . [But] that doctrine is hardly compatible with the spirit of the [Brussels] Convention.").

42. *See, e.g.*, Council Regulation 44/2001, *supra* note 35, arts. 5, 13–14.

43. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See also* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

44. For an explanation of the difference between general and specific personal jurisdiction in U.S. federal law, *see* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 451–53 (6th ed. 2002).

45. Hanson v. Denckla, 357 U.S. 235, 249 (1958); *Int'l Shoe*, 326 U.S. at 320.

traditional notions of fair play and substantial justice."[46] This is a context-based and open-ended approach to jurisdiction.

The U.S. Supreme Court judgment in *J. McIntyre Machinery, Ltd. v. Nicastro*[47] offers a relatively recent example. *Nicastro* marked a legal transition away from due process concerns and toward principles of sovereignty. Though *Nicastro*'s implications are unclear, particularly because of the lack of a majority opinion, the case provides a recent example of Supreme Court thinking on jurisdiction, and it deals with coercion explicitly in its reasoning.

Robert Nicastro severed four of the fingers on one of his hands whilst using a metal shearing machine that J. McIntyre Machinery Ltd. made in England.[48] McIntyre, a U.K. firm, sold its products in the United States through an American distributor.[49] Nicastro sued McIntyre in a state court in New Jersey. McIntyre sold four machines in New Jersey through its American distributor.[50] Nicastro's employer learned of the McIntyre machine at the largest trade show in the business— that year the trade show was held in Las Vegas. McIntyre employees attended every year from 1995 through 2005, and the McIntyre chief executive was a regular attendee.[51] McIntrye intended to sell the machine to anyone anywhere in the United States, and it promised service wherever its customers were based.[52] Its exclusive U.S. distributor from at least 1995 until 2001 was named McIntyre Machinery America Ltd., though the distributor was an independent firm from the English McIntyre. The area in which the product was sold was the fourth largest import destination in the United States at the time.[53]

The issue before the Supreme Court in *Nicastro* was whether New Jersey courts could assert jurisdiction over the English manufacturer. A plurality opinion written by Justice Kennedy and joined by Justices Roberts, Scalia, and Thomas found that New Jersey state courts lacked jurisdiction. Justice Breyer, who was joined by Justice Alito in concurrence, also found against jurisdiction. Both the plurality and concurrence focused on McIntyre's contacts with the state of New Jersey and found them insufficient to justify jurisdiction.

46. *Int'l Shoe*, 326 U.S. at 316, 320, 324–25.
47. J. McIntyre Mach., Ltd v. Nicastro, 131 S. Ct. 2780 (2011).
48. *Id.* at 2795.
49. *Id.* at 2786.
50. *Id.*
51. *Id.* at 2796.
52. *Id.* at 2795–96.
53. *Id.* at 2801.

The plurality and dissent in *Nicastro* both dealt with the coercive qualities of jurisdiction over foreigners, but did so in different ways. The justices expressed broad agreement about the relationship between coercion and justifying jurisdiction, as evidenced by their handling of the Due Process analysis.[54] As Justice Kennedy explained in the plurality opinion, "[t]he Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power."[55] Justice Ginsburg's dissenting opinion in *Nicastro* makes no explicit reference to the justification of coercion. However, Justice Ginsburg impliedly handled the justification of coercion as a question of liberty under the Due Process Clause properly resolved by comparing the reasonableness of burdens on the parties to the litigation.

The plurality in *Nicastro* framed the case in terms of the sorts of power a sovereign can justifiably exercise over non-citizens. The plurality reasoned from the premise that, "[a]s a general rule, neither statute nor judicial decree may bind strangers to the State."[56] The plurality referred to the concept of *coram non judice*, the idea that if the court lacks jurisdiction over a person, the person is before someone who is not a judge and the proceeding is not judicial. Whilst the plurality opinion acknowledged that the sufficient contacts test requires that the suit not offend "traditional notions of fair play and substantial justice,"[57] Justice Kennedy went on to make the puzzling assertion that "freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law."[58] The plurality criticized prior rulings of the Court for discarding "the central concept of sovereign authority in favor of considerations of fairness and foreseeability,"[59] which the plurality saw

54. Jurisdiction in these cases is a result of the application of so-called long arm statutes. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 68–70 (3d ed. 1996) (explaining "State Long-Arm Statutes" and "Federal Long-Arm Statutes and Rules").

55. *Nicastro,*131 S.Ct. at 2786. In a companion case decided on the same day*,* Goodyear Dunlop Tires Operations, S.A. v. Brown, the U.S. Supreme Court held that North Carolina state courts lacked jurisdiction over foreign subsidiaries of Goodyear USA, in a case involving an auto accident in France in which a U.S. citizen was injured. *See generally* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011). Goodyear easily commanded a majority of the Court. The *Goodyear* judgment is uncontroversial. Unlike the situation in *Nicastro*, in *Goodyear*, the injury did not occur in the state where the claim was being brought, nor did the foreign defendants do business there. *See Goodyear Dunlop Tires*, 131 S. Ct. at 2852, 2855 (noting that the Petitioner was not registered to do business in North Carolina and that "the act alleged to have caused injury . . . occurred outside the forum").

56. *Nicastro,* 131 S. Ct. at 2787.

57. *Id.* at 2783 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

58. *Id.* at 2787.

59. *Id.* at 2788 (referencing Asahi Metal Indus. Co v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102, 117, 1034 (1987) (Brennan, J., concurring)).

as "inconsistent with the premises of lawful judicial power."[60] Indeed, the plurality distinguished between authority and fairness, citing authority, but not fairness, as the basis for lawful exercise of the court's power.[61] For purposeful availment, the defendant "submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State."[62] This is "submission through contact with and activity directed at a sovereign."[63] On these rationales, the plurality found no jurisdiction.

The dissent, authored by Justice Ginsburg, took a different approach. Two basic points distinguish the dissent from the plurality. First, the dissent's version of federalism differed substantially from that of the plurality. The plurality saw the case from the standpoint of the United States as a common market:[64] "'In the international order,' the State that counts is the United States."[65] Sovereignty was not relevant to the dissent, as their concern was about how federalism operates in the United States. Sovereignty, according to the dissent, provides no legal standards by which to determine whether courts have jurisdiction. Second, the dissent focused on fairness and reasonableness. It found that the modern approach to jurisdiction gives "prime place to reason and fairness."[66] According to the dissent, "the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty."[67] Restrictions on state sovereignty have to be understood as related to liberty interests protected by the due process clause. For the dissent, the defendant's consent simply has no role.[68] Justice Ginsburg argued that "presence" and "implied consent" are legal fictions concealing the actual bases of personal jurisdiction in reasonable restrictions on liberty.[69]

The dissent identified the question as whether it is fair to require the sellers of a product, claimed by the plaintiff to be defective and to have caused injury, to defend a suit at the place of injury. The key inquiry,

60. *Id.* at 2789.

61. *Id.* at 2788–89.

62. *Id.* at 2788.

63. *Id.*

64. *Id.* at 2801 (Ginsburg, J., dissenting) ("McIntyre UK dealt with the United States as a single market. . . . it was concerned . . . with its subjection to suit anywhere in the United States.")

65. *Id.* at 2801 (Ginsburg, J., dissenting) (quoting Degnan & Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 813–15 (1988)).

66. *Id.* at 2800 (Ginsburg, J., dissenting).

67. *Id.* at 2798 (Ginsburg, J., dissenting).

68. *Id.* at 2799 n.4 (Ginsburg, J., dissenting) (citing Brilmayer, *Rights, Fairness, and Choice of Law*, *supra* note 5, at 1304–06, and other academic literature on both sides of the consent issue).

69. *Id.* at 2798.

according to the dissent, is determining "when it is appropriate to subject a defendant to trial in the plaintiff's community."[70] The dissent would compare the burdens and benefits of the parties by examining such factors as "litigational convenience," which would include an analysis of witness convenience and ease of determining applicable law.[71] As the dissent put it:

> Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?[72]

The dissent argued that courts should appraise jurisdiction differently in cases that involve a "local plaintiff . . . injured by the activity of a defendant engaged in interstate or international trade" and those "in which the defendant is a natural or legal person whose economic activities" are largely local.[73]

Comparing U.S. Supreme Court judgments on jurisdiction with the CJEU's applications of the Brussels I Regulation illustrate a substantially different approach to jurisdiction in the EU. The European courts apply a set of nearly exceptionless categorical rules on when an EU member state has jurisdiction. Those rules are based generally on the domicile of the defendant in an EU member state. The rationale for this categorical approach is legal certainty.[74] The European approach reflects a civilian tradition in which the exercise of discretion by judges is to be restricted. The American approach relies on balancing factors to assess due process for the defendant. This reflects a peculiarly American approach to common law jurisprudence in which the exercise of judicial discretion is seen as part of the judge's job.[75] Nevertheless, if the *Nicastro* facts were before a European court, the result would most likely be similar to that reached by

70. *Id.* at 2804.

71. *Id*.

72. *Id.* at 280l.

73. *Id.* at 2804.

74. *See* Council Regulation 44/2001, *supra* note 35, pmbl. ("The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.").

75. Both American law on jurisdiction and the Brussels I Regulation also allocate jurisdiction. The Brussels law does so for the EU whilst American law does so for U.S. states and also applies when foreign states are implicated.

the *Nicastro* dissent, as the Brussels I Regulation specifies that jurisdiction exists for tort cases where the harmful event occurred.[76]

5. Territorial Sovereignty: Defendant Served in the Forum

When the Brussels I Regulation does not apply, English law provides a simple and categorical approach: finding jurisdiction solely on the presence of the defendant in England or Wales.[77] At the risk of oversimplifying, for natural persons this can be temporary presence, but for companies it means doing business in England or Wales from a fixed location. It is thus similar to the 19th century U.S. decision in *Pennoyer v. Neff*,[78] that service of process must be accomplished within the state where the suit was brought for a court to have jurisdiction over the person.

6. All of the Litigants' Contacts With the Forum

No law of any jurisdiction that I am aware of relies on such a principle.

7. When Justice So Requires

Can a broad contextual principle based on when justice so requires govern jurisdiction over foreigners? Consider the following hypothetical. Workers in oil fields of Big Oil Inc. in the developing country of Resourcia are exposed to a variety of toxic chemicals in their jobs. They live and work in an area that has suffered severe environmental degradation and have been exposed to serious health hazards as a result of the Big Oil activities. The Resourcian government has promulgated health, safety, and environmental standards, but they are not enforced in the area of Big Oil's operations. Certain cancers are prevalent among oil workers in Resourcia and among residents who live near the oil fields run by Big Oil. Workers and residents have filed a class action in the United States, but to avoid the liberal class action laws of the United States, Big Oil has steadfastly avoided doing business in the U.S. at a level sufficient to establish minimum contacts. None of the plaintiffs are American citizens or residents.

With regard to this scenario, we find guidance from the recent U.S. Supreme Court decision concerning the Alien Tort Statute ("ATS"), *Kiobel*

76. Council Regulation 44/2001, *supra* note 35, art. 5.

77. Under English law, the possibility of serving outside the territory also exists, but its practice is restricted because permission of the court is required, and the plaintiff must demonstrate that a *forum non conveniens* analysis would not result in a stay of the case.

78. 95 U.S. 714, 733–34 (1877).

v. Royal Dutch Petroleum.[79] The ATS vests the U.S. federal district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[80]

In *Kiobel*, Nigerian nationals who had been granted political asylum in the United States and who were living there sued British, Dutch, and Nigerian companies in U.S. federal district court under the ATS.[81] The plaintiffs were previously residents of Ogoniland, in the Niger River delta of Nigeria.[82] Two of the defendants were holding companies incorporated in the Netherlands and the United Kingdom,[83] and another was a subsidiary incorporated in Nigeria and jointly owned by the two holding companies. The companies were all involved in oil exploration and production in Ogoniland.[84] The plaintiffs alleged that when Ogoniland residents began to protest the environmental effects of the Nigerian subsidiary's practices, the defendants persuaded the Nigerian government to violently suppress the protests by beating, raping, killing, and detaining Ogoniland residents, as well as by destroying and looting property.[85] The plaintiffs further alleged that the defendants aided and abetted human rights violations being committed by the Nigerian forces by providing these forces with food, transportation, and funding, as well as letting these forces use its property to plan and stage attacks.[86] None of these activities occurred in the United States. The defendants successfully obtained a dismissal of the complaint. The defendants were unsuccessful on appeal. The Supreme Court granted *certiorari* on whether the ATS is a jurisdiction statute and whether corporations can be held liable in tort under the ATS.[87]

During the proceedings in *Kiobel*, the Supreme Court requested supplemental briefs and oral argument on "[w]hether and under what circumstances the [Alien Tort Statute] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[88] A majority of the Court held that there exists a presumption against extraterritoriality that is only rebutted

79. 133 S. Ct. 1659 (2013).
80. 28 U.S.C. § 1350 (2012).
81. 133 S. Ct. at 1662–63.
82. *Id.* at 1662
83. *Id.*
84. *Id.*
85. *See id.*
86. *Id.* at 1662–63.
87. *Id.* at 1663.
88. *Id.*

where there is "a clear indication of extraterritoriality."[89] The Court held that it lacked jurisdiction in *Kiobel* because neither the text nor the legislative history of the Alien Tort Statute contained such an indication.[90] The Court essentially held that in order for a federal district court to have jurisdiction to decide if a tort has been committed against a non-U.S. national in violation of international law, there must be some connection between the wrong committed and the territory of the United States. In its conclusion, the Court explained that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[91] "[M]ere corporate presence" in the United States would be insufficient.[92] Actual commission of the tort in the United States would clearly be sufficient. But beyond those bright lines it is difficult to forecast the results of a given case based on *Kiobel*. As Justice Kennedy explained in his concurring opinion, the Court was "careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[93]

In his concurring opinion, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, stated another possible test for exercising jurisdiction under the Alien Tort Statute: find jurisdiction when (1) the alleged tort occurs in the United States, (2) the defendant is a U.S. national, or (3) the defendant's conduct "substantially and adversely affects an important American national interest," to include "a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind."[94]

8. Jurisdiction with Exceptions: *Forum Non Conveniens*

Once a court determines that it has jurisdiction, should a defendant be able to argue that the case should be dismissed (U.S. law) or stayed (English law) because another forum is more appropriate? Though of Scottish origins, the doctrine of *forum non conveniens* is understood as one found in common law jurisdictions. But England and Ireland are unable to apply the doctrine in cases falling within the Brussels I Regulation; *forum non conveniens* has been banished from the harmonized European legal

89. *Id.* at 1665. (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010)).

90. *Id.* at 1666.

91. *Id.* at 1669.

92. *Id.*

93. *Id.* (Kennedy, J., concurring).

94. *Id.* at 1671 (Breyer J., dissenting).

scheme for jurisdiction, having been criticized for undermining the foundational principle of legal certainty.[95]

In English law, *forum non conveniens* received its most definitive treatment in *Spiliada Maritime Corp. v. Cansulex*.[96] In this House of Lords judgment, Lord Goff explained that a court will grant a stay on *forum non conveniens* grounds only if it is satisfied that some other available forum with jurisdiction is appropriate. The appropriate forum is one where the case may be tried "more suitably for the interest of all of the parties and the ends of justice."[97] Lord Goff articulated a number of factors to consider in any such exercise of judicial discretion. If the plaintiff has jurisdiction as of right in a British court, the court will not lightly grant a stay.[98] The defendant has the burden of proving not only that the U.K. is not the natural or appropriate forum, but also that another forum is clearly more so. In deciding a request for a stay, the court should look first at factors relating to the other forum. It should look for the "natural" forum, that is, the forum with "the most real and substantial connection" to the case.[99] Factors to consider in such a determination include convenience, expense, governing law, and residence or place of business of the parties.[100] If no such natural forum exists, the court should refuse the stay. If such a natural forum exists, the court should grant the stay unless justice requires otherwise. In such a determination, a court should examine all of the circumstances, including whether the plaintiff can obtain justice in the other forum.[101] In dealing with what Lord Goff characterized as "legitimate personal or juridical advantage," the court should assess whether the case may be "suitably tried for the interests of all the parties and for the ends of justice."[102] The plaintiff may have many advantages in a British court, but if justice can be done elsewhere and the above factors are satisfied, a court may grant the stay. Courts should look for "practical justice" in such cases.[103] For example, even if a plaintiff may have discovery advantages in

95. *See generally* Case C-281/02, Owusu v. Jackson, 2004 ECR I-1383.

96. *See generally* [1986] 1 AC 460 (HL) (appeal taken from Eng.).

97. *Id.* at 476.

98. I use the term 'British' and not 'English' courts because *Spiliada,* a House of Lords judgment, is precedent for all UK jurisdictions and the *forum non conveniens* doctrine is of Scottish origin in any event.

99. *Spiliada*, 1 AC at 477–78 (quoting The Abidin Daver [1984] 1 AC 398, 415 (PC) (appeal taken from Eng.)).

100. *The Abidin Daver*, 1 AC at 410–11.

101. *Id.*

102. *Spiliada*, 1 AC at 476, 480.

103. *Id.* at 483.

England that it might not have in a civil law jurisdiction, the court should not be prevented from granting a stay on *forum non conveniens* grounds.

As a result of federalism, American law contains diverse *forum non conveniens* standards; nonetheless, *forum non conveniens* is alive and well under both state and federal law. The doctrine vests U.S. courts with discretion to dismiss a suit on motion from a defendant if a foreign court "is the more appropriate and convenient forum" and the foreign court is both available and adequate.[104] Supreme Court jurisprudence on the doctrine calls for a two-part analysis: first, a determination whether an available and adequate forum exists, and second, consideration of private and public interest factors to determine whether to dismiss the plaintiff's suit.[105] The second criterion is not examined unless the first is satisfied.

As for the first criterion, U.S. federal courts split along two lines when evaluating the adequacy: they either do not examine the adequacy of the foreign judiciary and look only to whether a remedy is available, or they engage in a minimal examination of the adequacy of the foreign judiciary and examine factors specific to the case to determine whether the foreign judiciary will be fair in litigating the case. These factors include whether the plaintiff can "have his claims adjudicated fairly (i.e. is the judiciary corrupt)" and whether plaintiff can "litigate his claims safely and with peace of mind (i.e. free from threats of violence and/or trauma connected with the particular claims)."[106] These claims have to be specific to the case at hand and not generalized accusations of corruption, delay, or other problems, as U.S. courts are reluctant to pass judgment on the adequacy of foreign judiciaries.[107]

As for the second criterion—balancing private and public interest factors—American courts look at numerous considerations. Private interest factors include practical problems associated with the litigation of the case, while public interest factors include, among others, whether local controversies should be sent a long distance away to be tried or whether the burden of jury duty should be imposed on local jurors when the case bears no or little connection to the jurisdiction.[108]

104. *See* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1453 (2011) (quoting Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007)).

105. *Id.* at 1456.

106. *Id.* at 1458 (quoting Base Metal Trading Ltd. v. Russian Aluminum, 98 F. App'x 47, 49–50 (2d Cir. 2004)).

107. *Id.* at 1459.

108. *Id.* at 1461.

Forum non conveniens is an uncontroversial and well-settled doctrine in common law jurisdictions that are not EU member states. However, EU law rejects *forum non conveniens* and the minority common law jurisdictions in the EU have had to suffer a loss of autonomy on this issue where the Brussels I Regulation applies. This became apparent in the above-mentioned English case *Owusu v. Jackson,* in which the CJEU held that British courts could not apply the *forum non conveniens* doctrine in cases of mandatory jurisdiction under Article 2 of what is now the Brussels I Regulation.[109]

In *Owusu*, the CJEU found the doctrine of *forum non conveniens* to be incompatible with the Brussels I Regulation.[110] Article 2 is mandatory, and respect for the principle of legal certainty contained therein would not be "guaranteed" if courts had discretion to apply *forum non conveniens*.[111] Thus, the CJEU found that *forum non conveniens* would undermine the predictability of the law for defendants who need to know whether they will be sued in their place of domicile or somewhere else.[112] The former is preferable because defendants are in a better place to defend themselves in the courts of their domicile.[113] These rationales, of course, are irrelevant, as it is the defendant who asks the court to stay the proceeding, arguing *forum non conveniens*. Additionally, the CJEU was concerned that the plaintiff would be put in the position of having to argue that he or she will not get justice in the foreign court. Finally, the CJEU was concerned that allowing the application of *forum non conveniens* would put the uniformity of rules on jurisdiction at risk.[114]

B. Jurisdiction as a Reasonable Restriction on Liberty

With the above case studies offering a set of legal principles to govern jurisdiction, some in force and others hypothetical, we have identified a range of social practices as part of our constructivist procedure. We can now begin to construct and test moral principles that might justify various legal principles.

At the outset, we should rule out of consideration of case study seven, "when justice so requires." We might want to develop a broader version of Alien Tort Statute jurisdiction than found in *Kiobel* but it would merit an entirely separate treatment from the one here. This article focuses on the

109. *See* generally Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1445.
110. *Id.* at 1459–62.
111. *Id.* at 1459–61.
112. *Id.* at 1460–61.
113. *Id.* at 1461.
114. *Id.*

more common principles of private international law, not the special case of the Alien Tort Statute. Moreover, the problem with a principle of "when justice so requires" is that it could be understood to lack the character of a jurisdiction-allocating rule of private international law, as it directs focus to "the merits" rather than to the threshold issue of whether a court has jurisdiction to decide the merits in the first place. When issues of jurisdiction arise, we want to assess and justify the fairness or moral correctness of a court exercising power over a person, as this is usually done against the person's will. Jurisdiction is power. It is generally compulsory in municipal courts. Once jurisdiction is established, other moral principles will be relevant to justifying the court's decision on the merits. Legal philosophers usually look for answers to the merits question in corrective justice. But before getting to questions about substantive justice, we must ask about procedural justice, which includes whether the court can take jurisdiction over the case.[115]

From the above cases, we can develop a number of moral principles that might justify exercises of jurisdiction. For the first case study, we could argue that jurisdiction is morally justified when the plaintiff alleges harm sufficient to bring a case before a court of the forum. For the second case study, we could construct a moral principle to support the argument that suing the defendant in his domicile is justifiable, and for the third, that reasonable coercion occurs when a court examines all of the defendant's contacts with the forum. We might additionally be able to argue that English law is grounded in a principle that jurisdiction is justifiable if based on a properly served writ when the defendant is in the territory. But all of these seem too particular. Liberty principles are among the more general moral principles we can apply and are relevant to all of our candidate legal principles.

A widely understood way to construct a liberty principle is either as negative liberty (freedom from interference brought about by a court exercising jurisdiction), or as positive liberty to pursue one's own ends, with law and public institutions facilitating the freedom to pursue one's own ends. There has been significant discussion in the philosophical literature about whether the distinction between negative and positive

115. This does not mean that no jurisdiction could ever be exercised in situations like case study seven. For example, after *Kiobel*, some foreign defendants will have sufficient connections to the United States for an American court to exercise jurisdiction under the Alien Tort Statute. Indeed, there may even be a moral case for a particular interpretation of the Alien Tort Statute, but that is beyond our scope here.

liberty holds.[116] For our purposes, we need only to focus on negative liberty. Our concern here is when a particular class of persons, that is, defendants in lawsuits, ought to be free from the will or interference of a court. Admittedly, I have laid out a very simplistic picture of liberty, but my aim here is only to construct principles by which to morally evaluate a particular set of legal rules on the jurisdiction of courts over foreigners. We do not need in this instance a comprehensive notion of liberty because we are focusing on a very narrow question about the application of judicial power in particular circumstances over a foreigner.

Our concern here is constructed moral liberty, which could be partly reflected in an instrument such as a constitution, but need not be. We are developing principles to *critique* legal instruments such as constitutions. However, this is not an attempt to constitutionalize private international law. American law may be understood as informing us about social practices in the application of the constructive procedure. So too for European law. Recall James's distinction between pure interpretivism and pure moralism. That American and European, or common law and civil law, approaches to jurisdiction differ as a legal matter does not affect a moral evaluation of the law on jurisdiction using the specified constructive procedure.

Moreover, we can accept as a given that, as Ralf Michaels explains, "[t]he main objective of both German law and the Brussels Regulation is not to protect defendants but rather to allocate jurisdiction to the most appropriate member state, regardless of sovereignty interests of the member states."[117] But in addition to allocating jurisdiction, European approaches serve the "quasi-constitutional function" of providing due process protections to defendants,[118] and American law, in addition to providing due process protections for defendants, allocates jurisdiction to U.S. states in a federal system as well as internationally.

Relying on this framework, consider the following principle:

L_1: Persons ought to be free from the exercise of a court's coercive powers in taking jurisdiction in a non-criminal case except when (i) the defendant's connections to the forum make it unreasonable for the defendant to reject the court's jurisdiction and (ii) the burdens for all

116. *See generally* Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, *in* LIBERTY 100 (David Miller ed., 1991). For a considerable reworking of the concept of liberty, *see* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (2001).

117. *See* Michaels, *supra* note 29, at 1043.

118. *Id.* at 1049.

affected persons associated with participation in the court proceedings make it unreasonable for each of them to reject the court's jurisdiction.

Note that Principle L_1 is structured to apply to all persons regardless of political allegiance. Start with the notion that foreign persons owe no allegiance to a particular state, nor are they subject to the laws of that state unless they undertake some affirmative act to make themselves subject to those laws.[119] The idea here is that the foreigner has to do something connecting her to the state in order for a court of that state to restrict her freedom.

A way to understand the contacts a foreigner might need for another state's court to impose its jurisdiction is through the moral notion of impartiality. Partiality towards the citizen does not appear to be justified in cases involving jurisdiction. Members of a political community may be subject to special obligations relating to their social contract, such as obligations relating to egalitarian justice. But where no such special obligations are relevant, no differentiated legal rights and duties may be warranted.[120] This is precisely how law is structured. What is necessary for jurisdiction is some morally relevant connection to the forum, regardless of citizenship.[121] Citizens already have sufficient connections to their own state so, jurisdiction over them is easily justified. To justify jurisdiction over foreigners, however, some connection to the state is needed. These connections need not be of the same kind, nor as extensive, as those of the citizen to the state. These connections share characteristics of moral significance with those of citizens to the state, excepting membership in the political community and connections relating to political participation. They will have to be connections rising to the level sufficient for a foreigner to have no reasonable complaint about the exercise of jurisdiction by the court of the forum.

The defendant's connections to the forum are dealt with in condition (i) in Principle L_1, and European and American approaches to jurisdiction satisfy this condition. The law of these forums requires a reasonable

119. We do not have to accept a consent-based argument to accept this basic proposition.

120. This argument aligns with Blake's claim about how egalitarian justice is required within a state to counteract inequality created by private law. *See* Blake, *supra* note 13, at 257–58.

121. My argument differs from those in Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006), which appears to have had some influence on the plurality in *Nicastro.* His arguments are doctrinal, grounded in constitutional text and in American case law on the lack of constitutional protections for foreigners in other areas. My arguments are moral, grounded in coercion by an organ of the state. My claim here is that no moral justification exists for an argument that foreigners deserve less negative liberty than citizens when it comes to a court's exercise of jurisdiction. If I am correct, morality trumps sovereignty.

connection between the defendant and the forum. But Principle L_1 requires us to go beyond the connections of the defendant to the forum. We must also consider the burden litigating in the forum will place on all affected parties. Where the plaintiff is concerned, one might think the voluntary act of choosing the forum by filing a writ or complaint satisfies the burden. Problems may still arise in cases of *forum non conveniens*, which could nullify the plaintiff's choice. At first blush, one might be tempted to think that *forum non conveniens* may limit burdens on the litigants and serve an essential purpose in meeting Principle L_1. This might be true, but the problem with *forum non conveniens* is that it does not provide sufficient guarantees that a court will apply it in a way that complies with Principle L_1.

Condition (ii) of Principle L_1 plausibly covers *forum non conveniens* in its references to burdens on affected parties litigating in the forum. *Forum non conveniens,* however, often seems to over emphasize the burdens on the defendant. Moreover, the inconsistent application of the doctrine problematizes the recognition and enforcement of foreign judgments. If a court applies *forum non conveniens* too liberally, it can lead to injustice by creating what Christopher Whytock and Cassandra Burke Robertson call a transnational access to justice gap.[122] To the extent that *forum non conveniens* acts as an escape valve to avoid the blind application of inflexible categorical rules, it improves the possibility of morally justifying the law of jurisdiction. But this may only be necessary if the law on jurisdiction does not perform the role of allocating jurisdiction to the best forum, as European law, including the Brussels I Regulation, is intended to do.[123]

Whytock and Robertson illustrate the transnational access to justice gap through an examination of the dibromochloropropane (DBCP) litigation that unfolded in the United States.[124] In the 1990s, thousands of Latin American and Caribbean natural persons sued a number of U.S. corporations, including Shell Oil Company and Dole Food Company in federal courts in California, Florida, and Texas.[125] DBCP is a pesticide banned long ago in both the United States and the European Union, with known effects including male sterility.[126] Exposure can occur though drinking contaminated water, inhaling contaminated air, or ingesting

122. *See* Whytock & Robertson, *supra* note 104, at 1477.

123. *See* Michaels, *supra* note 29, at 1045–47.

124. *Id.*

125. *Id.*

126. *See* EPA TECH. TRANSFER NETWORK, http://www3.epa.gov/ttn/atw/hlthef/dibromo-.html (last visited Nov. 9, 2015).

contaminated food.[127] The plaintiffs alleged that Shell produced DBCP and that Dole used it in banana fields in Nicaragua and elsewhere in Latin America and the Caribbean.[128] The federal suits were eventually consolidated in the U.S. District Court for the Southern District of Texas.[129]

In *Delgado v. Shell Oil Co.*,[130] the defendants successfully argued that the court should dismiss all of the actions on *forum non conveniens* grounds and that the more appropriate and adequate forums were the courts of various countries in Latin America, the Caribbean, West Africa, and the Philippines.[131] The Nicaraguan plaintiffs therefore sued in Nicaragua, obtaining over $2 billion in judgments, which they sought to enforce in U.S. courts.[132] In one suit, where a Nicaraguan court issued a $489.4 million judgment against Shell, the company preemptively filed suit in the U.S. District Court for the Central District of California seeking a declaratory judgment that the Nicaraguan judgment was unenforceable, arguing that the Nicaraguan legal system failed to provide impartial tribunals and due process.[133] But Shell's argument in California contradicted its argument in Texas.[134] In its earlier *forum non conveniens* motion in Texas, Shell argued that Nicaraguan courts were adequate and would offer plaintiffs "a full and fair opportunity to present their claims."[135] The plaintiffs argued, "[U]nhappy with the result of the decision rendered by the Nicaraguan Courts, Shell returns to the United States Courts arguing— out of the other side of their mouth— that the Nicaraguan legislative and judicial systems are corrupt, unfair and failed to provide Shell due process."[136] The plaintiffs added that if Shell's argument

127. For a review of major DBCP litigation since 1980, see generally Vicent Boix & Susanna R. Bohme, *Secrecy and Justice in the Ongoing Saga of DBCP Litigation*, 18 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 154 (2012).

128. Whytock & Robertson, *supra* note 104, at 1475–76.

129. *Id.*

130. Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd,* 231 F.3d 165 (5th Cir. 2000).

131. *Id.* at 1371–73.

132. *Id.* at 1330.

133. Shell Oil Co. v. Franco, No. CV 03–8846 NM (PJWx), 2005 WL 6184247, at *4–6 (C.D. Cal. Nov. 10, 2005).

134. *Compare Delgado*, 890 F. Supp. at 1362, *with Shell Oil*, 2005 WL 6184247, at *4–6.

135. *See* Whytock & Robertson, *supra* note 104, at 1477 (quoting Notice of Motion and Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. Proc. 12(b)(6); Memorandum of Points and Authorities in Support Thereof; Declaration of Paul A. Traina at 1, Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2004 WL 5617921 (C.D. Cal. Mar. 12, 2004)).

136. *Id*.

prevailed, there would be "no place on this earth where an individual poisoned by DBCP may have his or her day in court."[137]

Shell responded by arguing that the judicial adequacy standard in the *forum non conveniens* doctrine is more lax than in the law on recognition and enforcement of judgments in the United States.[138] The difference, Shell argued, is that the *forum non conveniens* doctrine in U.S. federal law says nothing about the need for impartial foreign tribunals.[139] Shell also claimed that its arguments in Texas were made in 1995, that they were now in court in 2002 in California, and that the Nicaraguan judiciary had deteriorated significantly during this period.[140] In particular, in 2000, the Nicaraguan legislature promulgated Special Law 364, which, among other things, provided for an irrefutable presumption of causation in DBCP litigation in Nicaraguan courts.[141] The Texas court ultimately held that the Nicaraguan judgments were unenforceable.[142]

In *Osorio v. Dole Food Co.*,[143] Nicaraguan plaintiffs sought to enforce a $97 million judgment against Dole, Shell and others in the U.S. District Court for the Southern District of Florida. As in *Delgado,* the defendants argued that *forum non conveniens* and enforcement of judgments are "fundamentally different inquiries."[144] Relevant to *forum non conveniens,* they directed the court's attention to deterioration in the Nicaraguan legal system.[145] Plaintiffs argued:

> [A]pplying the law in such a manner, where one standard exists to send cases to be tried abroad and a different standard exists when cases from abroad are sought to be enforced in this country, would result in an unjust application of the law and create not only a loophole that would allow transnational corporations to act with complete immunity in developing countries, but would result in U.S. corporations benefitting from both a more lenient dismissal standard and a more stringent enforcement standard.[146]

137. *Id*.

138. *Id.*

139. *Id.*

140. *Id.* at 1477–78.

141. *Id.* at 1492.

142. *Id.*

143. 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

144. Whytock & Robertson, *supra* note 104, at 1479.

145. *Id.*

146. *Id.* Unfortunately, some of the DBCP cases were tainted by fraud in the production of evidence. *See* Matthew J. Heller, *Rotten Bananas: How Dole Food's Lawyers Discovered a Fraud on the Court, Casting Doubt on a Plaintiff's Bonanza*, CAL. LAWYER (Nov. 9, 2015), https://ww2.callawyer.com/clstory.cfm?pubdt=NaN&eid=904524&evid=1. For gripping accounts of the

The *Osorio* defendants made the same arguments that had been raised in *Delgado.* The *Osorio* Court denied enforcement of the foreign judgment.

The DBCP litigation suggests that a modification of the doctrine of *forum non conveniens* might be needed to ensure its moral justification. Whytock and Robertson go through a number of possible correctives for U.S. federal law, including a "return jurisdiction clause," which might operate like a stay, the usual disposition of a successful *forum non conveniens* ruling by an English court.[147] Moreover, English law on *forum non conveniens* may be better at avoiding a transnational access to justice gap. As Lord Goff explains, the English law version requires the court to assess whether the plaintiff will obtain justice in the other forum, which seems at least to invite a more extensive inquiry than into the adequacy of the forum, as required by American law.[148] Under English law, the plaintiff's interests are also taken into account. Of course, the devil is always in the details of the application of the standard by courts.

How does Principle L_1 take the plaintiff's interests into account? We should return to the dissent in *Nicastro:* "Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e*., a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?"[149] The case studies that develop from existing law tend to focus on the defendant's interests. *Forum non conveniens* seems in practice to heighten the focus on the defendant. Case study six, which does not reflect the law in any jurisdiction that I am aware of, but which requires a court to consider all of the litigants' contacts with the forum, just might be the least morally objectionable, particularly if the state in question has a *forum non conveniens* that is too liberal in favor of defendants.

To conclude, when we ask moral questions about the effect of jurisdictional rules in private international law, we ask about what might justify the coercive effects of jurisdiction on foreigners. We want to know

problems in some of these cases, see Judgment Dismissing All Plaintiffs With Prejudice, Mejia v. Dole Food Co., No. BC340049 (L.A. Cnty. Super. Ct. June 26, 2009); Judgment Dismissing All Plaintiffs With Prejudice, Rivera v. Dole Food Co., No. BC379820 (L.A. Cnty. Super. Ct. June 26, 2009); Findings of Fact and Conclusions of Law Supporting Order Terminating *Meija* and *Rivera* Cases for Fraud on the Court, Nos. BC340049, BC379820 (L.A. Cnty. Super. Ct. June 17, 2009); Laguna v. Dole Food Co., No. BC233497 (Cal. Ct. App. Mar. 7, 2014).

147. Whytock & Robertson, *supra* note 104, at 1499.

148. *See* Spiliada Maritime Corp. v. Cansulex, Ltd. [1986] 1 AC 460, 475 (HL) (appeal taken from Eng.).

149. J. McIntyre Mach., Ltd v. Nicastro, 131 S. Ct. 2780, 2800–01 (2011).

why the law of a state with whom a person has no relationship has practical authority or moral legitimacy. What gives the law and the courts of a state to which a person owes no allegiance the right to rule, in the form of compulsory jurisdiction of its courts? I have approached this problem as one of reasonable restrictions on liberty.

III. ENFORCING FOREIGN JUDGMENTS AND JUSTIFIABLE COERCION

What sorts of normative questions might we ask about the law on recognition and enforcement of foreign judgments? In a common fact pattern, a citizen of state B asks a court of state A to recognize and enforce a judgment of state B in favor of the citizen of state B and against a citizen of state A. In this typical example, the court in state B has already decided the case in favor of its own citizen;[150] the foreign claimant is asking the court in state A for assistance in collecting on the judgment against a citizen of State A. The court of state A may, for example, order liens on the property of a citizen of state A, at the request of a foreigner from state B. The foreigner from state B may have a substantial claim on the merits against the citizen of state A. There may also be cases in which a citizen of state A must go abroad to get a judgment, particularly if state A operates in the common law tradition and has a liberal *forum non conveniens* doctrine.

To go about morally evaluating this area of law, consider four different ways the law could have developed, ranging from outright rejection of recognition of all foreign judgments in all cases to total acceptance of such judgments. Between these two extremes are mid-level principles such as those of comity, reciprocity, and full faith and credit (with exceptions).

Coercion plays a similar role in the enforcement context as it did in our discussion of jurisdiction. The law must meet a moral standard to which no affected party to the litigation could reasonably object. The moral principle will have to take the interests of both the citizen and the foreigner into account. We can develop a liberty principle and ask whether the law on recognition and enforcement of a foreign judgment interferes in some way with the liberty either of the person seeking enforcement or of the person defending against it.

150. The above description is characterized as typical or stylized because there are many possibilities for the nationality of the parties to litigation, and there are often multiple parties to international litigation of differing nationalities and allegiances, some legal persons and others natural persons.

Unlike for jurisdiction, from a moral point of view, the law on recognition and enforcement of judgments has to be reasonably partial to citizens. A judgment by a foreign court has been reached on the merits. The judgment-enforcing forum has an interest in ensuring that the foreign judgment complies with the collective moral convictions of its people, located in its legal institutions and its political order. It is settled law in many states that to be enforceable, the foreign judgment cannot contravene the "public policy" of the state, a generally very limited defense in the United States and elsewhere. In the language of political philosophy, the law of peoples or political communities is special to the society in question and is part of the social contract of that particular society. For example, a foreign judgment violating Sharia law will not be enforceable in some nations where Islam is essential to the social contract.[151] This is partiality to the citizen, in the sense that the values of the forum bind the members of the political community in question, and the law on recognition and enforcement of judgments reflects these values. Another example is the refusal of British courts to enforce American judgments imposing punitive damages, though this refusal may have less to do with fundamental values, as in the Sharia example, and more to do with what is considered an acceptable remedy in civil cases. Although a distinct defense in the law on recognition and enforcement of foreign judgments, judgments failing to meet basic due process standards might be said to be included in this public policy standard as well.[152]

A candidate moral principle might be as follows:

L_2: A person is subject to the enforcement of a foreign judgment against her, or to have a foreign judgment enforced on her behalf, when that foreign judgment (i) complies with (but does not necessarily further) important values of the state in which it is sought to be enforced and (ii) was rendered in a way that meets basic standards of due process or natural justice.

Principle L_2 suggests reasonable constraints on freedom. It is general and covers both citizens and foreigners as plaintiffs and defendants. It takes the values and law of political communities into account and specifies when that freedom can be restricted in a way that no one can reasonably reject.

151. *See generally* Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrom online ed., 2009).

152. *See, e.g.*, TREVOR HARTLEY, INTERNATIONAL COMMERCIAL LITIGATION 367–69 (2009) (characterizing arguments about the due process standards of foreign jurisdictions).

To test Principle L_2, consider the following approaches to recognizing and enforcing foreign judgments.

First, consider a scenario in which courts reject any and all applications for recognition and enforcement of judgments from any court outside of the state. These courts would follow legal rules giving full respect to their own judgments but none whatsoever to the judgments of courts outside the forum. French Law prior to 1964, for example, required *révision au fond*, a review of the foreign judgment on the merits, applying French law.[153] Further, some states refuse to recognize foreign judgments outright in the absence of a treaty such as the Brussels I Regulation, as has been the case in the Netherlands and some Scandinavian countries.[154]

The "total rejection" approach is not as unusual as it appears, as recognition and enforcement of judgments is a relatively new subject.[155] With the rise of Westphalian sovereignty, it had been a more longstanding tradition to refuse to recognize and enforce judgments from foreign courts.[156] It is, however, now widely acknowledged that an "important foundation" for the recognition and enforcement of judgments is that courts will no longer refuse to recognize and enforce foreign judgments out of hand, simply because they are foreign.[157]

The total rejection approach is unreasonable and it violates Principle L_2. Several moral objections to a total rejection rule seem evident from the perspective of both foreigners and citizens. From the perspective of the foreigner, it mandates a strident form of partiality and nationalism. In any such approach, states owe absolutely nothing to foreigners. It places disproportionate burdens even on the citizens of the state in which the court sits. They may obtain judgments in foreign courts requiring enforcement at home. Therefore, the principle of absolute rejection in all cases could be said to violate even the social contract of the domestic society in particular cases.

Consider a slight modification of the *Kiobel* facts. Suppose instead of initiating suit in the United States, the plaintiffs, who are Nigerian nationals but also American residents,[158] won a judgment in England and sought enforcement against the British, Dutch, and Nigerian corporate defendants

153. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481, reporter's note 6(c) (AM. LAW. INST. 1990); *see also* Hilton v. Guyot, 159 U.S. 113, 217 (1895).

154. *See* Michaels, *supra* note 151, ¶ 3.

155. *Id.* ¶ 6.

156. *Id.* ¶¶ 6–7.

157. *Id.* ¶ 29.

158. They had political asylum in the U.S. and likely had permanent resident status as a result. *See generally* Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1663 (2013).

in the United States. It would be difficult to believe that an outright rejection by American law of the English judgment, solely on the basis that it was a judgment of a foreign court, would be morally justifiable.[159]

Now let us consider a "total acceptance" approach: one that treats foreign judgments and domestic judgments identically. With total acceptance, we have a thoroughly cosmopolitan approach to recognition and enforcement of judgments. All courts are essentially treated as domestic courts of every state. This approach fails because it neither accounts for the quality or pedigree of the judgment nor comports with the values or public policy of the forum. It violates Principle L_2 as well: the approach simply will not work unless there is a much higher degree of uniformity and cooperation among states on recognition and enforcement of judgments than is presently the case.

A third approach is one based on reciprocity, more commonly known as comity. There is some indication that in the United States, the pre-*Erie Railroad Co. v. Tompkins* aproach to recognition and enforcement of judgements was based on reciprocity. The leading case was *Hilton v. Guyot*, which stated a principle of comity but then went on to hold that a French judgment could not be enforced because of a lack of "mutuality and reciprocity."[160] France would not recognize and enforce U.S. judgments. As was a common approach to judicial reasoning in the 19th century, the U.S. Supreme Court reached this decision using something like a *jus gentium* approach advocated by Jeremy Waldron,[161] that is, on the basis of a study of the laws of other countries. The Court concluded that "the rule of

159. This is not the state of American law, which tends to be liberal about enforcing judgments, particularly English ones. As Judge Posner explains in *Society of Lloyd's v. Ashenden,* 233 F.3d 473, 476 (7th Cir. 2000), "Any suggestion that [the English] system of courts does not provide impartial tribunals or procedures compatible with the requirements of due process of law borders on the risible. [T]he courts of England are fair and neutral forums." (internal quotation marks and citation omitted). *See also* Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir. 1992) (recognizing that English law provides a fair and neutral forum); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889); *Hurtado v. California*, 110 U.S. 516 (1884); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 465 (7th Cir. 1988); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975); *In re* Hashim, 213 F.3d 1169, 1172 (9th Cir. 2000) ("[T]he English [judicial] 'system . . . is the very fount from which our system developed; a system which has procedures and goals which closely parallel our own.'") (ellipses in original) (brackets omitted) (quoting Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161, 166 (E.D. Pa. 1970)); British Midland Airways Ltd. v. Int'l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974) ("United States courts which have inherited major portions of their judicial traditions and procedure from the United Kingdom are hardly in a position to call the Queen's Bench a kangaroo court.").

160. *See* Hilton v. Guyot*,* 159 U.S. 113, 228 (1895).

161. *See generally* JEREMY WALDRON, PARTLY LAWS COMMON TO ALL MANKIND: FOREIGN LAW IN AMERICAN COURTS (2012).

reciprocity has worked itself firmly into the structure of international jurisprudence."[162]

Reciprocity is not currently part of U.S. law, nor is it the current law of many other states. But it nonetheless offers one potential approach to regulating recognition and enforcement of foreign judgments. But, absent a comity principle, it is unsatisfactory, as it may result in an unreasonable recognition and enforcement of a judgment by a foreign court lacking competent jurisdiction, which violates basic due process standards and the public policy of most forums.

The current state of the law in states with a cosmopolitan, or at least internationalist, outlook on recognition and enforcement of foreign judgments is one reflective of the concept of full faith and credit, but with exceptions. It is essentially *Hilton* minus reciprocity:

> [W]here there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice . . . or fraud . . . , the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . [163]

American law on recognition and enforcement of judgments is primarily state law. Most states have passed the Uniform Foreign Money Judgments Recognition Act.[164] This Act is broadly based on the comity principles outlined in *Hilton*, but without reciprocity.[165] Canadian law is similar,[166] as is the Brussels I Regulation.

Of these three practices, the full faith and credit with exceptions approach is the least objectionable under Principle L_2. Defendants have fewer grounds to complain, as comity principles disallow recognition and enforcement when the foreign court lacks jurisdiction and when the judgment is tainted by fraud, violates the public policy of the forum, or has other serious defects. As explained in the prior part of this article, an important protection for defendants in American law is that the country

162. *Hilton,* 159 U.S. at 227.

163. *Id.* at 202–03.

164. *See generally* Uniform Foreign Money Judgments Recognition Act of 1962, 13 U.L.A. 263 (1986).

165. *See id.* § 5.

166. *See* Morguard Invs. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 1078 (Can.); Beals v. Saldanha, [2003] S.C.R. 416, 420 (Can.).

whose court issued the judgment must have impartial tribunals. Some U.S. jurisdictions assess compatibility with an "international concept of due process" standard as the touchstone of the impartiality inquiry.[167] The in that case plainly meets the procedural fairness elements of Principle L_2. Defendants cannot reasonably argue for a total rejection approach to the recognition and enforcement of foreign judgments, and reciprocity will produce arbitrary results for them, based on something like a lottery of which states recognize and enforce the judgments of other states. Plaintiffs have few grounds to complain about such liberal enforcement principles, which take community values into account.

Of course, the transnational access to justice gap, discussed in Part II, has the potential to present a problem here. The gap is caused by application of *forum non conveniens* and enforcement principles in a way that deprives plaintiffs of the means by which to seek redress. *Forum non conveniens*, if relevant in the jurisdiction, as it is in the UK for judgements not subject to the Brussels Regulation and at the federal level in the US and in many US states, should not undermine compliance of the law on recognition and enforcement of judgments with Principle L_2.

To conclude, a liberty principle such as Principle L_2 can be developed to justify a flexible internationalist approach to foreign judgments in which courts defer substantially to foreign judgments. Indeed, an overly restrictive legal principle may be morally arbitrary. To protect the liberty of the litigants, however, particularly that of the citizen defendant, it is necessary for the law to impose some restrictions. The values of the state in which enforcement is sought, which reflect the values of the social contract of a particular political community, trump recognition and enforcement of a foreign judgment in conflict with those values.

CONCLUSION

The aim of this article has been to develop a moral justification for private international law in order to understand the sorts of claims that private international law makes on foreigners to comply with its dictates. I have offered a strategy for morally justifying the law on both jurisdiction and the recognition and enforcement of foreign judgments, two of the three main areas of private international law. This strategy is based on the notion that we have to focus on justifying the coercive features of these areas of private international law in any philosophical account of them. The particular focus is on justifying restrictions on liberty resulting from the

167. Osorio v. Dole Food Co., 665 F.Supp.2d 1307, 1327–28 (S.D. Fla. 2009).

application of legal rules on jurisdiction and the recognition and enforcement of foreign judgments.

This article strives to fill a gap in the literature on private international law. Although private international law has received substantial attention in socio-legal studies and in global legal pluralism literature,[168] it is an area of law that has received scant attention in legal and political philosophy, as political philosophy has tended to ignore the characteristics of the law that defy simple assumptions about law and territory. These characteristics, which are essential to private international law, are also essential to law's proper functioning, particularly in the global age in which we now live.

A future direction for this work should be to devote attention to the notion of the "person" and to power relationships arising in international litigation. The class action cases discussed above bring these issues to our attention. The users of private international law, and the subjects of its application, are often multinational enterprises. Philosophical inquiry about power and how it is employed in international litigation would likely provide us with important insights about globalization and governance in the global economy.

168. *See generally* Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. OF L. & SOC. SCI. 243–62 (2009). Paul Schiff Berman dedicates an entire part of his book (three chapters) to private international law. *See* Paul Schiff Berman, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE BEYOND BORDERS 191–322 (2012).